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In the Supreme Court of the United States

ESTHER KIOBEL, *et al.*,

Petitioners,

—v.—

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF AUSTRALIAN INTERNATIONAL LAW SCHOLARS, *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are Australian International Law scholars engaged in all aspects of public international law at law schools across Australia. *Amici Curiae* have no personal stake in the outcome of this case. Our interest is in seeing the international rule of law upheld and applied in a manner consistent with the Constitution of the United States.

Amici Curiae (amici) seek to highlight error in certain positions staked out by the Commonwealth of Australia (Australia) in relation to its jurisdictional opposition to the Alien Tort Statute, 28 U.S.C. §1350 (ATS). To our knowledge, prior to 2004 Australia never publicly protested or judicially challenged the exercise of ATS jurisdiction. Starting in 2004, however, in two cases, Australia joined in a series of *amici curiae* briefs filed in the Supreme Court of the United States and the Circuit Court of Appeals for the

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[1]All parties to this appeal have consented to the filing. *Amici* affirm that no counsel for a party authored the brief in whole or part and no person other than *amici* or their counsel made a monetary contribution to this brief.

Ninth Circuit[2] to challenge the assertion of extraterritorial jurisdiction under the ATS.[3]

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[2] Australian scholars have highlighted the political nature of "the Australian government's role in attempting to undermine [the ATS]". Anne O'Rourke and Chris Nyland, *The Recent History of the Alien Tort Claims Act: Australia's Role in its (Attempted) Downfall*, 25 Australian Y.B. Int'l L. 139, 142 (2006). According to O'Rourke and Nyland, the involvement of coalition government of Prime Minister John Howard "in the Bush Administration's campaign to restrict the jurisdiction of the [ATS]" in *Sosa* was consistent with the government's "general opposition to the linking of trade and investment with human rights". *Id.*, at 140-141.

[3] Australia appeared first as amici to challenge ATS jurisdiction in the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and subsequently in the Ninth Circuit and the Supreme Court in *Sarei v. Rio Tinto*, 671 F.3d 736 (9th Cir. 2011). *See, e.g.*, Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), 2004 U.S. S.Ct. Briefs LEXIS 910 (U.S Jan. 23, 2004) ("*Sosa* Brief"); Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia As Amici Curiae in Support of the Defendants-Appellees/Cross-Appellants, *Sarei v. Rio Tinto, PLC.*, 671 F.3d 736 (9th Cir. 2011) (Nos. 09-56381, 02-56256, 02-56390), 2009 WL 8174961 (9th Cir. Dec. 16, 2009) ("*Sarei* brief"); Motion for Leave to File Brief as Amici Curiae and Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioners on Certain Questions in Their Petition for a Writ of Certiorari, *Rio Tinto, PLC. v. Sarei*, No. 11-649, 2011 WL 6934726 (U.S. Dec. 28, 2011) ("*Sarei* SCOTUS Motion").

A central position Australia has advanced in error bears directly on the question that the Court has ordered the parties to brief supplementally. *Kiobel v. Royal Dutch Petroleum*, Order in Pending Case (Order List: 565 U.S., March 5, 2012)(10-1491). In particular, Australia maintains that international law prohibits the exercise of ATS jurisdiction where a tort committed in violation of the law of nations takes place outside the United States of America (U.S.) in the absence of a close nexus. This position is incorrect at international law and is belied by Australia's own projection of extraterritorial jurisdiction.

Amici have an interest in providing the Court with an impartial discussion and analysis of the proper application of norms of international law supporting the exercise of extraterritorial jurisdiction under the ATS. In contrast to the Australian government, Australian scholars who have considered the ATS have been uniformly supportive of litigation thereunder and its permissibility at international law. *See* Sarah Joseph, *Corporations and Transnational Human Rights Litigation* 148-151 (2004); Adam McBeth, *International Economic Actors and Human Rights: Global Rules for Global Players* 304 (2011); Odette Murray, David Kinley & Chip Pitts, *Exaggerated Rumours of the Death of an Alien Tort:*

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To date, Australia has not appeared as *amicus* to challenge jurisdiction in this case, but Australia's prior briefing on this issue has been relied on by the respondents and a number of amici supporting the respondents in *this* appeal.[5] It is thus important to hear from amici.

SUMMARY OF ARGUMENT

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[4] One Australian court has cited ATS cases with approval in rejecting Australian government arguments about the applicability of the act of state doctrine in relation to claims by an Australian citizen held prisoner at Guantánamo Bay, Cuba. *Habib v. Commonwealth*, 265 A.L.R. 50, 77-78 (2010) (Jagot, J.).

[5] *See, e.g.*, Brief of Amici Curiae BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, and International Business Machines in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 WL 392536 (U.S. Feb. 3, 2012); Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, GlaxoSmithKline PLC, and the Procter & Gamble Company as Amici Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 WL 392538 (U.S. Feb. 3, 2012).

The argument by amici is limited in scope. Amici emphasize that their brief only addresses one aspect of Australia's objections to extra-territorial application of the ATS – namely, that international law purportedly prohibits the exercise of U.S. jurisdiction for violations of international law (that are also torts) occurring within the territory of a sovereign other than the U.S.[6] In addition, amici limit their argument to tortious violations of international law that constitute gross human rights violations cognizable under the ATS. Amici show that international law sets no jurisdictional prohibition on the ATS in this context. Indeed, international law is permissive instead; it is clear in this case that ATS jurisdiction lies at international law.

The essence of the Australian position is based on its claimed "opposition to overly broad assertions of any extraterritorial civil jurisdiction

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[6] While strictly outside of the scope of the question briefed here, Australia has maintained that ATS jurisdiction over foreign nationals and foreign factual circumstances is improper. This is clearly not the case. *See* Michael Akehurst, *Jurisdiction in International Law*, 64 Brit. Y.B. Int'l L. 145, 177 (1972-73) (in civil cases "the assumption of jurisdiction by a State does not seem to be subject to any requirement that the defendant or the facts of the case need have any connection with that State"); Gerald Fitzmaurice, *The General Principles of International Law*, 92 Rec. des Cours 1, 73-81 (1957). Moreover, as seen in section II.C, *infra*, Australia projects jurisdiction over foreign nationals and foreign factual circumstances in a way akin to the ATS.

arising out of aliens' claims against foreign defendants for foreign activities that have allegedly caused foreign injury." *Sarei* SCOTUS Motion at 1. Australia maintains that "international law does not permit U.S. courts to exercise extraterritorial civil jurisdiction to adjudicate [ATS] claims with little or no connection to the United States." *Id.* at 5. In the context of gross human rights violations, such as those alleged here,[7] Australia professes a strong commitment to "the promotion of, and protection against violations of, human rights," *id.* at 1, but curiously seems content to see their violation go without remedy.

Australia opposes U.S. protection against gross human rights violations under the ATS because it "would interfere fundamentally with other nations' sovereignty, and does not fall within accepted bases of jurisdiction under international law." *Id.* at 8. This argument by Australia cannot withstand scrutiny, and the argument by amici here proceeds along two lines. First, the exercise of ATS jurisdiction in connection with gross human rights violations in the sovereign territory of other states is clearly permissible under international law. In order to demonstrate otherwise, it is incumbent on Australia to prove the existence of an international rule binding on the U.S. that prohibits such exercise. This Australia cannot do.

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[7] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010).

Second, Australia's own projection of extraterritorial jurisdiction extends to persons, things, and events in the sovereign territory of other countries in a way akin to ATS jurisdiction. Like ATS jurisdiction, Australia's exercise of extraterritorial jurisdiction is permissible under international law. However, it clearly undermines Australia's argument against the ATS.

ARGUMENT

I. Contrary to Australia's claim, international law does not prohibit the assertion of extraterritorial jurisdiction under the ATS

A. The Australian starting point of analysis is backwards

In 1927, the Permanent Court of International Justice (PCIJ) set down the basic international rule on the exercise of jurisdiction by states. The PCIJ recognized a need to account for a world of independent, autonomous, and equal states and an international legal system built around consent. As a result, the court ruled that the exercise of jurisdiction (be it prescriptive or adjudicatory) by a state is presumptively lawful absent proof of a positive international rule that prohibits the exercise of such jurisdiction. The court explained:

> Far from laying down a general prohibition to the effect that States may not extend *the*

> *application of their laws* and *the jurisdiction of their courts to persons*, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (1927) (Sept. 7) (emphasis added).

This jurisdictional bedrock for prescriptive and adjudicative jurisdiction is still the fundamental starting point in the international allocation of jurisdictional competence. *See Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 77-79 (Feb. 14) (joint separate opinion of Judges Buergenthal, Higgins, and Kooijamns).[8] The compelling basis for the rule lies in the consensual nature of the international legal system. The starting point of analysis of contested action in such a system must be a presumption of permissibility, which can only be overcome if it can be shown that the action is prohibited by a binding

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[8] Eminent Australian publicists confirm the continuing vitality of *Lotus*. Gillian Triggs, *International Law: Contemporary Principles and Practices* 434 (2d ed., 2011); I. A. Shearer, *Starke's International Law* 183-184 (11th ed., 1994); D.W. Greig, *International Law* 212-213 (2d ed., 1976); D.P. O'Connell, *II International Law* 601-602 (2d ed., 1970).

treaty, custom, or general principle of law. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 135 (June 27);[9] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8).[10]

The *Lotus* presumption is still applied by Australian courts. *See XYZ v. Commonwealth* (2006) 227 C.L.R. 532, 576 (Kirby, J.); *The Queen v. Ahmad* (2011) 254 F.L.R. 361, *rev'd on other grounds*, (2012) 256 F.L.R. 423. It was applied in the 2002 *Arrest Warrant* case by the only judges to address the question of jurisdiction – Judges Buergenthal (United States), Higgins (United Kingdom), and Kooijmans (the Netherlands). These judges quote *Lotus* at length and conclude that "while representing the high watermark of laissez-faire in international relations," it continues to serve as the default rule. *Arrest*

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[9] The Court emphasized that "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the . . . State can be limited, and this principle is valid for all States without exception". *Id.* at 135.

[10] Because the Court could not locate a positive rule prohibiting the threat or use of nuclear weapons in *every* circumstance, the Court opined -- albeit with controversy because lesser limiting rules, acknowledged by the Court, exist -- that it could not "conclude definitively" whether such threat or use would be "unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake[.]" *Id.* at 266.

Warrant, 2002 I.C.J. at 78 (*Lotus* "represents a continuing potential in the context of jurisdiction . . .").

The rule in *Lotus*, as Judges Buergenthal, Higgins, and Kooijmans indicate, does not mean that anything goes in international law – jurisdictionally or otherwise. Ancient international norms and the proliferation of more recent international law – especially the vast corpus of international human rights, investment treaties, and trade law – increasingly limit a state's permissible range of action.[11] However, it is plain under the *Lotus* rule that Australia's basic argument in its *Sosa* and *Sarei* briefs is backward.

Australia argues that international law does not permit the exercise of ATS jurisdiction because the U.S. purportedly cannot bring itself within one of the recognized basis of international jurisdiction.[12] This, of course, is not what international law requires and, thus, cannot be what is required of or by the ATS. Instead, *Lotus* and its progeny teach that the burden of proof is on Australia to demonstrate conclusively a rule of international law binding on the U.S. that prohibits the exercise of jurisdiction under the

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[11] "States have increasingly used their power to limit their power . . .." Elihu Lauterpacht, *Sovereignty – Myth or Reality*, 73 Int. Aff. 137, 149 (1997). *See also S.S. Wimbledon Case* (U.K. v. Japan), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17).

[12] Sosa Brief, supra n. 4, at 4-7; Sarei Brief, supra n. 4, at 5-8.

ATS.[13] This Australia cannot do because a positive rule of prohibition does not exist.

Amici note the existence of a small number of contrary arguments by highly respected international lawyers.[14] However these arguments are often made without reliance on authority and despite the language and logic of *Lotus*. Vaughn Lowe, for instance, claims "it is extremely improbable that . . . the Court [in *Lotus*] meant [what it said]." Lowe also claims it does not appear states objecting to extraterritorial jurisdiction have sought to prove a prohibitive rule since the 19th Century. The more reasonable way to look at things, of course, is that the Court did indeed mean what it said. Moreover, it is more likely that objecting states have not put forward positive prohibitive rules because, like here, they simply cannot and must fall back on trying to confuse the issue. In any event, Lowe ends up adopting the view that if there is a "linking point" between the asserting of jurisdiction and the foreign aspect at

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[13] While ATS jurisprudence clearly requires an ATS plaintiff to prove that the tort complained of is part of the corpus of international law, *Sosa*, 542 U.S. at 725, the rule in *Lotus* makes clear that the exercise of ATS jurisdiction is presumptively valid without more.

[14] Vaughn Lowe, *Jurisdiction*, in International Law 335-336 (Malcolm D. Evans, ed., 2003). See also F.A. Mann, *The Doctrine of Jurisdiction Revisited After Twenty Years*, 186 Rec. des Cours 19, 33 (1984-III)(calling *Lotus* old and discredited, but recognizing that still "it may be . . . that international law cares not about legislative jurisdiction").

issue "one may presume that the State is entitled to legislate." Even if Lowe is correct, as amici discuss *infra*, the ATS has the necessary "linking points" in cases involving gross violations of human rights.

B. No positive prohibition in international law restricts the extraterritorial application of the ATS

1. No treaty or custom explicitly prohibits the exercise of ATS jurisdiction

It is indisputable that no treaty binding on the U.S. prohibits the exercise of ATS jurisdiction against foreign defendants for gross violations of human rights in other states that amount to torts in violation of international law. Nor does customary international law contain any such prohibition.

The litmus test in the formation of a customary norm prohibiting jurisdiction is the quantum of state protest. Michael Akehurst, *Jurisdiction in International Law*, 64 Brit. Y.B. Int'l L. 145, 169 (1972-73); Gerald Fitzmaurice, *The General Principles of International Law*, 92 Rec. des Cours 1, 73-81 (1957). Here, it does not appear that any general protest by states over the exercise of ATS jurisdiction ever took place until after 2002. Since then, only *six* states (Australia,

Canada, Germany, The Netherlands, Switzerland, and the United Kingdom) out of over *one hundred and ninety* states in the world have bothered to advance general legal challenges to ATS jurisdiction[15] – as opposed to a few case-specific diplomatic letters.[16]

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[15] Note too that many states that serve as the principal place of business for companies that have been ATS defendants have not protested against the exercise of ATS jurisdiction. For example, France did not protest about Total S.A. in *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001). China did not protest about the China Construction Bank in *Liu Bo Shan v. China Construction Bank*, 421 Fed.Appx. 89 (2d Cir. 2011). Neither Nigeria nor the Netherlands protested about Shell Nigeria or Shell during the thirteen year span of litigation in *Wiwa v. Royal Dutch Petroleum Co.*, 626 F.Supp.2d 377 (S.D.N.Y. 2009). Again, Nigeria did not protest about Chevron Nigeria Ltd. in *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010).

[16] A detailed, but non-exhaustive, search discloses that Indonesia protested by letter in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 59 (D.C. Cir. 2011)(objecting only to "extraterritorial jurisdiction of a United States Court over an allegation against an Indonesian government institution"). Canada protested by letter in *Presbyterian Church of Sudan v. Talisman*, No. 01 Civ. 9882(DLC), 2005 U.S. Dist. LEXIS 18399, 2005 WL 2082846 (S.D.N.Y. Aug. 30, 2005) (complaining about the assertion of jurisdiction by U.S. courts over claims against Canadian companies and individuals over acts that occurred entirely outside of the U.S.) and filed an amicus brief in the appeal. *Talisman*, 582 F.3d 244 (2d Cir. 2009). Balanced against this resistance are letters favorable to ATS jurisdiction. Papua New Guinea intervened by letter in the *Sarei v. Rio Tinto* case (once in opposition and later a number of times in favor of the exercise of ATS jurisdiction). *See Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1202-03 (C.D. Cal.

Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, [2007] 1 A.C. 270 (H.L.), [2007] 1 All E.R. 113, the sole case of which amici are aware outside of the U.S. questioning certain extraterritorial aspects of the ATS in dicta, was really concerned with the immunity of Saudi officials. It was not litigation against a private actor as here and did not require consideration of extraterritorial jurisdiction. Indeed, Mance, L.J., in the case below, noted that the jurisdictional issues were "unargued and unresolved." [2004] EWCA Civ 1394, at para. 81.

It is evident no customary rule of international law prohibits the exercise of ATS jurisdiction. Absent is the required "extensive and virtually uniform" protest against ATS jurisdiction necessary to show "a general recognition that a rule of law or legal obligation is involved." *North Sea Continental Shelf Cases* (F.R.G. v. Denmark;

2002); *Sarei v. Rio Tinto Plc*, 650 F. Supp. 2d 1004, 1017-18 (C.D. Cal. 2009). South Africa intervened twice by letter in *In re South African Apartheid Litigation* twice (once in opposition to ATS jurisdiction and once again in). Moreover, both the second South Africa letter and the later PNG letters said that resolution of the case in US courts would not affect ongoing peace and reconciliation processes and would in fact be beneficial for the administration of justice.

F.R.G. v. Netherlands), 1969 I.C.J. 3, 41-45 (Feb. 20).[17]

2. The ATS is not an unlawful interference in the domestic affairs of other states

Australia argues that ATS jurisdiction "interfere[s] fundamentally with other nations' sovereignty"[18] because it "infringes on the rights of other states to regulate matters within their territories" in "conflict with the principles of international law."[19] Customary international law does, as Australia says, prohibit one state from interfering in matters that are essentially within the domestic jurisdiction of another state. *Cf. Nicaragua Case* 1986 I.C.J. at 106.[20] Unlawful interference has taken many forms, ranging from the use of force to more subtle but insidious attacks on the political and legal independence of a

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[17] We recognize that in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal noted that the "very broad form of extraterritorial jurisdiction [under the ATS] [...] has not attracted the approbation of States generally." *Arrest Warrant*, 2002 I.C.J. at 77. However, a customary rule of prohibition required under the *North Sea Continental Shelf Cases* arises not because the assertion of jurisdiction complained of is endorsed, but because it attracts a widespread and uniform vocal condemnation.

[18] *Sarei* SCOTUS Motion, *supra* n. 4, at 8.

[19] *Sarei* Brief, *supra* n. 4, at 9.

[20] *See* Article 2(7) of the *Charter of the United Nations*, 1 U.N.T.S. XVI (Oct. 24, 1945).

state.[21] At the most fundamental level, though, interference is unlawful when one state presumes to take action in relation to another state's domestic jurisdiction in order to alter exclusively domestic matters legally or politically.

Of course, whether a certain matter is within the exclusive domestic "jurisdiction of a state is essentially a relative question; it depends on the development of international relations." *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).[22] In addition, jurisdiction that, in principle, belongs solely to a state may be limited by other rules of international law. *Id.* Matters of "general international law can no longer be regarded as essentially falling within domestic jurisdiction," especially when it involves an outside attempt to protect human rights from "gross and systematic violations."[23]

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[21] *See* Ellery C. Stowell, *Intervention in International Law* 322-325 (1921); Philip C. Jessup, *A Modern Law of Nations* 172-174 (1948).

[22] *See An Australian Opinion on Article 15(8) of the Covenant of the League of Nations*, 7 Brit. Y.B. Int'l L. 185 (1926)(J.G. Latham highlighting uncertainties about whether even immigration and the White Australia policy were solely matters of domestic jurisdiction).

[23] Felix Ermacora, *Art. 2(7)*, in *The Charter of the United Nations: A Commentary* 139, 152-153 (Bruno Simma, ed., 1995).

All states have a well-established legitimate interest in protecting against gross violations of human rights anywhere they occur. Judge Philip Jessup, in his concurring opinion in the *South West Africa Cases* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, 425-428 (Dec. 21) (Preliminary Objections), used various minorities treaties, the Genocide Convention, and the Constitution of the International Labor Organization to show "the right of a State to concern itself, on general humanitarian grounds, with atrocities affecting human beings in another country." *Id.* at 425. Judge Jessup went on to emphasize that "[t]he fact which this case establishes is that a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions and that it may assert such interest without alleging any impact upon its own nationals or its direct so-called tangible or material interests." *Id.* at 428. This legal interest of all states in the observance of human rights has been notably supported by publicists worldwide,[24] and

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[24] International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10 at 110-11, U.N. Doc. A/56/10 (2001) ("all states have a legal interest" in the protection of human rights); U.N. Human Rts. Comm., *Gen. Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, at para. 2, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Institut de Droit International, 63 *Annuaire de l'Institut de*

the doctrine is supported in *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (U.N. Charter "makes it clear that . . . a state's treatment of its own citizens is a matter of international concern").

Judge Jessup's recognition of the legal interest of all states in the prevention and remedy of gross human rights violations is expressed today as a right *erga omnes*. *See* Restatement (Third) of the Foreign Relations Law of the United States § 702 & cmt. o. (1987)("gross violations of internationally recognized human rights" . . . "are violations of obligations to all other states and any state may invoke the ordinary remedies available to a state when its rights under customary law are violated"). The *erga omnes* legal interest of all states in the prevention and remedy of gross violations of human rights by any other state is well established. *See, e.g., Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Sp.), 1970 I.C.J. 3, 32 (Feb. 5); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 349-350 (Dec. 19) (separate opinion of Judge Simma); *Nuclear Weapons Opinion* 1996 I.C.J. at 257 (July 8); *East Timor* (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30). *See also Siderman*

Droit International (1989)-II, at 286 & 288-289. *See also* Myres S. McDougal, et al., *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* 313-323 (1980).

de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992); *Kane v. Winn*, 319 F.Supp.2d 162, 196 n.45 (D. Mass. 2004); *R. v. Immigration Officer at Prague Airport*, [2004] UKHL 55, para. 46 (Steyn L.J.).

The legal conclusion tied to the right of every state to concern itself with human rights violations is straightforward. It is certain every state, including the U.S., has a right to be concerned about gross violations of human rights (that are also torts) wherever they occur. This legitimate concern renders unavailing the worn out objection that the manifestation of such concern by other states is an unlawful interference in the domestic jurisdiction of the state where those abuses are taking place.

Naturally, international law does not require any specific means of remedy, but a universal right of states to provide one has been convincingly demonstrated in cases of gross human rights abuses that are torts.[25] More to the point, though,

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[25] *See* Cedric Ryngaert, *Universal Tort Jurisdiction Over Gross Human Rights Violations*, 38 Neth. Y.B. Int'l L. 3 (2007)(universal civil jurisdiction is permissible). *See also* Restatement (Third), *supra*, at § 404, cmt. b ("international law does not preclude the application of non-criminal law on [a universal] basis, for example, by providing a remedy in tort"); International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* 2-3 (2000); Robert Jennings &

under *Lotus* the rule against interference in essentially domestic jurisdiction that Australia puts forward does not prohibit the exercise of ATS jurisdiction because it simply does not apply. All states have a significant legal interest in ensuring the protection against gross violations of human rights everywhere.

3. The exercise of ATS adjudicatory jurisdiction is reasonable

Finally, Australia claims that the assertion of ATS jurisdiction will create "a substantial risk of jurisdictional conflicts"[26] because it is not "compatible with the exercise of jurisdiction by other states."[27] While this may be a concern to be addressed through *lis pendens* conflicts rules in the future if more states adopt ATS-type jurisdiction (as is to be hoped), it remains a hypothetical problem now. More importantly, concurrent international jurisdiction is not uncommon and is not a bar to its exercise. *See Trujillo v. Conover & Co. Communs., Inc.*, 221 F.3d 1262, 1265 (11th Cir. 2000); *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F. Supp. 2d 248, 252-253 (D. Mass., 1999); *Cont'l Cas. Co. v. Axa Global Risks (UK) Ltd.*, 2010 U.S. Dist. LEXIS 32850, *11-*13 (W.D. Mo.); *See also Re*

Arthur Watts, *Oppenheim's International Law*, 469-70 (9th ed., 1996).

[26] *Sarei* Brief, *supra* n. 4, at 1.

[27] *Sosa* Brief, *supra* n. 4, at 4.

Colonel Aird; Ex parte Alpert, (2004) 220 C.L.R. 308, 348 (Kirby, J.); *XYZ v. Commonwealth*, (2006) 227 C.L.R. 532 (Kirby, J.).

Still, Australia's jurisdictional compatibility concerns do raise a different potential rule of prohibition in relation to ATS jurisdiction under the *Lotus* principle. As Judge Fitzmaurice in the *Barcelona Traction* case stated:

> international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction . . . but leaves to States a wide discretion. It does however (a) postulate the existence of limits . . . ; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable, by another state.

Barcelona Traction, Light and Power Co. (Belg. v. Spain) 1970 I.C.J. 3, 105 (Feb. 5) (Separate Opinion of Judge Fitzmaurice)

This is similar to the position taken by the Restatement, which indicates the exercise of jurisdiction must be "reasonable" in order to be

lawful under general international law.[28] Determining reasonableness requires a process of assessment that considers the relative importance of the link(s) between the state asserting jurisdiction and the individual, the legitimate expectations of those affected, and the likelihood of conflict with other states. *See F. Hoffman LaRoche Ltd v. Empagran, S.A.*, 542 U.S. 155, 164-165 (2004).[29] Moreover, the reasonableness test applies on a case-by-case basis and cannot serve as a general bar to the extraterritorial application of the ATS. *See In re Alstom SA*, 406 F.Supp.2d 346, 385, 396-397 (S.D.N.Y. 2005) (finding both reasonable and unreasonable extraterritorial jurisdiction present in the same case). While these factors tend toward the malleable, their application here confirms ATS jurisdiction will be reasonable in almost all cases.

Australia argues, in essence, that under the ATS it is unreasonable for the U.S. to exercise jurisdiction over "matters, persons or things with which it has absolutely no concern." *See Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation*, (1939) 49 C.L.R. 220,

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[28] Restatement (Third), *supra*, at §§ 403(1) and 421(1). *See also* Andreas F. Lowenfeld, *Public Law in the International Arena*, 163 Rec. des Cours 311, 328-329 (1979-II).

[29] *See also* Oscar Schachter, *International Law in Theory and Practice* 256-261 (1991).

239 (Evatt, J.) Australia points out that ordinarily ATS actions involve disputes between aliens, based on activities in other states. The argument, however, easily fails for the same reasons related to the claim of domestic interference above. Whatever may have been said in 1933 about gross violations of human rights when Justice Evatt wrote, it is certain today that no state has "absolutely no concern" in this realm. Instead, as demonstrated, all states have a strong legitimate and legal interest in remedying gross violations of human rights no matter where they occur. It is commonplace that states "have concerned themselves with the condition of human rights in other countries" and "accepted that human rights are of international concern . . .. Every country has at one time or another made human rights in some other country its own business, and has thereby accepted that human rights at home are someone else's business." Louis Henkin, *The Age of Rights* 25, 29 (1990).

II. Australia legally asserts and projects extraterritorial jurisdiction in ways akin to the ATS

Amici begin by pointing out that arguments advanced by Australia against the international legality of ATS extraterritorial jurisdiction are belied by Australia's own legislative assertions and judicial projections of jurisdiction beyond its

borders. It is disingenuous for Australia to claim that the ATS is not permitted by international law when Australia can and does legally assert and exercise extraterritorial jurisdiction in ways that are remarkably similar. Indeed, in studying Australian examples, amici find support for (not opposition to) ATS jurisdiction.

A. Australia exercises broad constitutional legislative jurisdiction over matters geographically external to Australia

Like the U.S., Australia is a federation in which the national government is a government of constitutionally limited and express powers.[30] While the U.S. Constitution does not expressly confer a power over "foreign affairs" on the federal government, the same is not true in Australia. Section 51(xxix) of the Australian Constitution specifically provides that "the Parliament shall . . . have power to make laws . . . with respect to . . . external affairs." *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c. 12, § 9.

Commonwealth authority over external affairs confers broad federal powers. It consists of

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[30] John Quick & Robert Garran, *The Annotated Constitution of the Australian Commonwealth* § 52, at 385 (1901).

at least three legislative aspects,[31] but for present purposes it suffices to highlight that it includes the power to make laws with respect to any matter, person, or thing that is geographically external to Australian territory. *New South Wales v. Commonwealth*, (1975) 135 C.L.R. 337;[32] *Polyukhovich v. Commonwealth*, (1991) 172 C.L.R. 501;[33] *Horta v. Commonwealth*, (1994) 181 C.L.R. 183, 194;[34] *XYZ v. Commonwealth*, (2006) 227 C.L.R. 532.[35] This feature of the Australian external affairs power provides constitutional potential for Australia to legislate extraterritorial jurisdiction in ways similar to the U.S. Congress.

In *Victoria v. Commonwealth*, (1996) 187 C.L.R. 416, a majority of six of the seven justices of the High Court of Australia emphasized:

> The modern doctrine as to the scope of the power conferred by s 51(xxix) was adopted in *Polyukhovich v. The Commonwealth*.

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[31] *See* Leslie Zines, *The High Court and the Constitution* 377-410 (5th ed., 2008).

[32] 135 C.L.R. (per Barwick, J., at 360; Mason, J., at 471; Jacobs, J., at 497; Murphy, J., at 504).

[33] 172 C.L.R. (per Dawson, J., at 632; Mascon, C.J., at 528-531; Dean, J., at 599-603; Guadron, J., 695-696; McHugh, J., at 712-714).

[34] A unanimous *per curiam* opinion.

[35] 227 C.L.R. (per Gleeson, C.J., at 538-539; Gummow, Hayne & Crennan, JJ., At 546-548).

Dawson J expressed the doctrine in these terms:

> [T]he power extends to places, persons, matters or things physically external to Australia. The word 'affairs' is imprecise, but is wide enough to cover places, persons, matters or things. The word 'external' is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs.'"
>
> Similar statements of the doctrine are to be found in the reasons for judgment of other Justices . . .. They must now be taken as representing the view of the Court.

Id. at 485 (footnotes omitted). Under established constitutional arrangements, then, it appears Australia has an unlimited constitutional power to prescribe in relation to everyone in the world, any place in the world, concerning anything in the world.[36] Indeed, this is a position Australia

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[36] While the clear majority position is that the geographically external aspect of the external affairs power requires no nexus to Australia, some minority opinions would require a nexus between the external matter and

seemed to advance in *Polyukhovich*, 172 C.L.R., at 503-504 (argument on behalf of the Commonwealth Director of Public Prosecutions).

It is true that Australia (like the U.S.) can constitutionally legislate in excess of the limits of international law.[37] However, as shown, cases of extraterritorial reach under the ATS (and like Australian situations discussed below) are within what is permitted by international law under *Lotus* and are not otherwise prohibited by international law. Within these same limits, it is certain Australia possesses the prescriptive power to enact legislation identical to the ATS. Indeed, amici note that Australia approached this point with the *Corporate Code of Conduct Bill* 2000 (Cth) (Corporate Code). The Corporate Code would have

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Australia. *Polyukhovich*, 172 C.L.R. at 552 (Brennan and Toohey, JJ.). It should also be noted that the issue of whether a nexus to Australia is required has been intentionally bypassed by two High Court decisions since *Polyukhovich*. *Horta*, 181 C.L.R. at 194; *XYZ*, 227 C.L.R. at 538-539 (Gleeson C.J.). *See also XYZ*, *id.* at 566-571 (Kirby, J.) (indicating difficulties with geographic externality principle); *id.*, at 598-604 (Callinan and Heydon JJ.) (rejecting the principle outright).

[37] *Compare United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (Congress "may legislate with respect to conduct outside the United States in excess of limits posed by international law"), *with Horta*, 181 C.L.R. at 195 (nothing requires that Australia's "legislative power . . . be confined within the limits of . . . international law").

imposed Australian Law, including human rights standards, on the activities of Australian multinationals taking place in the sovereign territory of other states.[38] Never once was the jurisdictional legality of the Bill questioned by the Government.[39] However, a lack of political will to pass the measure – not international legal obstacles – meant that it lapsed.

B. Statutory examples of broad extraterritorial jurisdiction

The following legislative examples demonstrate that Australia exercises prescriptive jurisdiction over activities in the sovereign territory of other states (as well as over non-Australians beyond Australian territorial jurisdiction).[40] This exercise of extraterritorial jurisdiction mimics that which Australia complains about in the ATS. The double standard puts the

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[38] Corporate Code at clause 10, *available at* http://www.comlaw.gov.au/Details/C2004B01333 (last accessed June 2, 2012).

[39] Parliamentary Joint Committee on Corporations and Securities, Report on the Corporate Code of Conduct Bill 2000, c. 4, para. 4.49 (noting only possible extraterritorial 'resentment', not illegality), June 2, 2012).

[40] *See also Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth), § 26(1); *Australia Act* 1986 (Cth), § 2(1); *Australian Securities and Investment Commission Act* 2001 (Cth), § 12AC; *Family Law Act* 1971 (Cth), §31(2); *Migration Act* 1958 (Cth), Division 12; *Surveillance Devices Act* 2004 (Cth), Part 5; *Trade Practices Act* 1974 (Cth), § 5(1).

Australian complaints in an unfavorable light and makes it difficult to take the complaints at face value.

It should be emphasized again, however, that the Australian legislative examples here are permissible under the *Lotus* principle. Moreover, such legislation has been enacted in the legal belief that its extraterritorial reach does not offend international law because in Australia "there is a *prima facie* presumption that the legislature does not intend to derogate from international law."[41] *Polities v. Commonwealth*, (1945) 70 C.L.R. 60, 68-69 (Latham C.J.), 77 (Dixon, J.), 79 (McTiernan, J.), 81 (Williams, J.).

1. *Migration Act* 1953 (Cth)

In *The Queen v. Ahmad* (2011) 254 F.L.R. 361, *rev'd on other grounds*, (2012) 256 F.L.R. 423, the accused was charged under section 232A of the *Migration Act* 1953 (Cth) (now repealed and replaced for reasons other than international law deficiencies). Under the Act, the accused was prosecuted for "people smuggling" by attempting to "facilitate" the entry into Australia of 49 non-citizens without valid visas by boat. The terms of the Act make clear its application "outside

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[41] Sir Anthony Mason, *International Law as a Source of Law in Domestic Law*, in Brian R. Opeskin & Donald R. Rothwell, eds., *International Law and Australian Federalism* 220 (1997).

Australia." It was undisputed that the defendant's boat had been intercepted and boarded by Australian Customs beyond of Australia's territorial sea and contiguous zone, where international law provides for freedom of navigation and the exclusive jurisdiction of the flag state prevails. In relation to the acts of "facilitation," it was argued by the accused that extending the prescriptive jurisdictional reach of section 232A beyond the contiguous zone conflicted with Australia's international obligations. The court rejected any bar to the exercise of jurisdiction by Australia in criminalizing extraterritorial facilitation. In doing so, the court cited *Lotus* to support Australia's "almost unlimited prescriptive jurisdiction . . . save . . . there may be international obligations accepted by the state to limit its competence." *Id.* at 21. The Court found none.

2. *Criminal Code Act* 1995 (Cth)(Criminal Code), Division 268[42]

Division 268 of the Criminal Code establishes the crimes of genocide, crimes against humanity, and war crimes. Under section

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[42] See also Division 115 of the Criminal Code. Division 115 asserts jurisdiction over the conduct of every person in the world (who is not an Australian or resident of Australia), in every state in the world outside Australia, for offences against Australians.

268.117(1), these crimes engage the widest jurisdiction possible under the Code – Category D jurisdiction under section 15.4. Together these provisions make it clearly possible to prosecute cases in which there is no nexus to Australia because, in combination, the legislation applies to anyone in the world, for conduct anywhere in the world, in relation to any victim regardless of nationality. Moreover, no foreign law defence is permitted. And, by virtue of section 12.1, the Division applies to the activities of corporations.[43]

When the Australian Joint Standing Committee on Treaties was considering Australian ratification of the Rome Statute of the International Criminal Court and the necessary implementing legislation, it confirmed that Division 268 was intended to confer Australian courts with universal jurisdiction.[44] The Committee went on to note that "the principle of universal jurisdiction of international human

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[43] Division 268 may have been the basis for Australian Federal Police investigations into the Australian Anvil Mining company in the Congo. *See* Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 Int'l Crim. Just. 809 (2007).

[44] Joint Standing Committee on Treaties, *Report 45 – The Statute of the International Criminal Court* 16-20 (May 2002),*available at* http://www.iccnow.org/documents/AustraliaICCReport45.pdf (last accessed June 9, 2011).

rights law, regardless of nationality, is not without precedent."[45]

Unlike the ATS, Division 268 concerns criminal jurisdiction. However, the analogy is still pertinent. Under Division 268, Australia is prepared, under the *Lotus* principle and universal jurisdiction, to insert itself into the sovereign territory of other states in order to remedy gross violations of human rights against non-Australians, committed by non-Australians (including corporations). Yet, at the same time Australia complains about an essentially identical assertion of U.S. jurisdiction form on the civil side, which is seen as less intrusive and abrasive. Given Division 268 of the Criminal Code, the complaint should be seen as baseless.

3. *Environmental Protection Biodiversity Conservation Act* (1999) (Cth) (*EPBC Act*), sections 27B, 27C, and Chap. 5A

By virtue of the *EPBC Act*, Australia asserts jurisdiction in the sovereign territory of other states over acts by non-Australians. Section 27B(1) of the *EPBC Act* provides that unless otherwise permitted, "[a] person must not take outside the Australian jurisdiction an action that

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[45] *Id.* at 93.

has, will have or is likely to have a significant impact on the environment in a Commonwealth Heritage Place outside the Australian jurisdiction." A breach of section 27B entails a civil penalty.[46] "Person" presumably includes any person in the world, including non-Australian nationals,[47] but under section 341C(2) of the Act, in order to be listed, places outside the Australian jurisdiction must be owned or leased by the Commonwealth. There are no Commonwealth Heritage Places currently listed outside the Australian jurisdiction and Parliamentary debates disclose some jurisdictional unease.[48]

However, Australia has also established a List of Overseas Places of Historic Significance to Australia. *EPBC Act*, chap. 5A. The list demonstrates an Australian "symbolic" interest in sites located in the territory of other countries. Thus far under the Act, Australia has listed sites in Turkey, Papua New Guinea, and the United Kingdom.[49] While these particular places have

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[46] Section 27C of the EPBC Act creates a criminal offence for the same action.

[47] *See Acts Interpretation Act* 1901 (Cth), § 2C.

[48] *See, e.g.*, Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 2006, 127 (Mr. Albanese).

[49] A diligent search failed to disclose any treaty between Australia and a state in which an Australian overseas place of historic significance is located that allows for this jurisdictional reach. The list includes Anzac Cove in Turkey, the Kokoda Trail in Papua New Guinea, and the

undoubted significance for Australia, it is not clear that other states will always appreciate this significance or the jurisdictional intrusion. Yet, Australia is of the view that the List of Overseas places is in accordance with international law because it is "respectful of the rights and sovereignty of other nations."[50]

4. *Export Control (Animals) Order* 2004 (Cth) (*ECO*), section 242A

Australia has been at the fore of animal welfare for a number of years.[51] According to the Australian Department of Agriculture, Fisheries and Forestry (DAFF), "Australia is the only country that requires specific animal welfare outcomes for livestock exports."[52] The Australian Position Statement on the Export of Livestock, contained in the most recent *Australian Standards*

Howard Floreys Laboratory in the United Kingdom. *See* Department of Sustainability, Environment, Water, Population and Communities, List of Overseas Places of Historic Significance to Australia, *available at* www.environment.gov.au/heritage/places/overseas (last accessed June 2, 2012).

[50] *Id.*

[51] *See generally* Alex Bruce, *Animal Law in Australia: An Integrated Approach* (2012).

[52] DAFF, Live Animal Export Trade (May 18, 2012), *available at* http://www.daff.gov.au/animal-plant-health/welfare/export-trade (last accessed June 3, 2012).

for the Export of Livestock, indicates that Australia will use its position as a livestock exporter as an "opportunity to influence change and improve animal welfare condition in . . . export destinations."[53]

In June 2011, Australia suspended live cattle exports to Indonesia for slaughter after the prevalence of animal welfare abuse in some abattoirs became apparent. Following consultations with exporters, Australian regulations for the live animal export trade, including the *ECO*, were amended to require greater exporter accountability for protection through the supply chain up to the point of overseas slaughter.

Section 2.42A(2) was added to the *ECO* (which contains standard conditions that must be included in all export licences) to require Australian exporters to provide written supply chain assurances about animal welfare. The requisite assurance must include documentation that provides evidence that the exporter has

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[53] *Australian Standards for the Export of Livestock* (Version 2.3) 2011, at 17, *available at* http://www.daff.gov.au/__data/assets/pdf_file/0010/1904365/australian-standards-v2.3.pdf. See also DAFF, Exporter Supply Chain Assurance System (ESCAS), available at: http://www.daff.gov.au/aqis/export/live-animals/livestock/escas (last accessed June 2, 2012).

control of animal welfare through the entire supply chain, including welfare conditions of handling and slaughter in other countries.[54] Australian exporters must provide evidence that livestock will be handled in importing countries in accordance with animal welfare guidelines established by the World Organization for Animal Health (OIE).[55] Section 2.42A(2)(v) of the *ECO* requires independent auditing and reporting of livestock welfare throughout the supply chain, including independent auditing of conditions of handling and slaughter in other countries.

It seems readily apparent that Australia, through section 2.42A, is projecting its legal concern about the humane handling and slaughter of livestock into the practices and regulatory frameworks of other states. It seeks to do so by way of international standards and reliance on individual exporters. These same things can be said about the ATS. The ATS exhibits a legitimate concern by the U.S. over gross human rights violations in other states. It does so by reference to

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[54] *ECO, available at* http://www.comlaw.gov.au/details/F2012C00134 (last accessed June 2, 2012).

[55] DAFF, Guidance on Meeting OIE Code Animal Welfare Outcomes for Cattle and Buffalo Version 2.2 (Aug. 20, 2011). *Cf.* Caley Otter, Siobhan O'Sullivan and Sandy Ross, *Laying the Foundations for an International Animal Protection Regime*, 2 J. Animal Ethics 52 (2012).

international standards (i.e. international norms that are also torts) and relies on individuals for implementation. It is clear, however, that Australia considers *ECO* compliant with international law (although it has bolstered its position by entering MOUs with importing states – something not required by *ECO*.)[56]

C. Adjudicatory Jurisdiction

In addition to an extraterritorial legislative reach, Australia has not infrequently exercised extraterritorial jurisdiction though adjudication, including the extraterritorial use of tort.[57] The exercise of Australian jurisdiction has commonly been extended beyond national frontiers to territories of sovereigns other than Australia. Three limited examples will serve to demonstrate Australia's projection of adjudicatory jurisdiction is a way similar to the ATS.

In *Dow Jones & Co. v. Gutnick*, (2002) 210 C.L.R. 575, Gutnick sued Dow Jones in relation to

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[56] *See* Australian Position Statement on the Export of Livestock (Nov. 2006).

[57] Vedna Jivan & Christine Forster, *Making the Unaccountable Accountable: Using Tort to Achieve Corporate Compliance with Human Rights Norms*, 15 Torts L.J. 263, 263-264 & n. 2 (2007) (discussing Australian actions arising from alleged torts committed outside of Australia by subsidiaries of mining companies headquartered in Australia).

alleged defamatory statements made by Dow Jones in the web version of its publication, Barron's Digest. Gutnick chose to sue in Australia, because he resided in Melbourne. The article, however, was authored in New York and placed on a web server in New Jersey. It was only accessible, no matter where in the world, for a fee paid to Barron's Digest, a publication concerning principally the U.S. economy and markets. The uploaded statements were protected free speech under the U.S. Constitution (and otherwise legal).

In ruling on a challenge to jurisdiction, the High Court held that an action for defamation will arise in the place where the damage (to reputation) occurs and allowed the action to proceed. It follows that an Australian court may apply non-Australian law applicable to conduct (including customary international law if required),[58] to hear a claim against a foreign company, for damage suffered in a foreign country. Indeed, jurisdiction may well lie in all the countries where access to that website

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[58] Alternatively, the government could incorporate customary international law into Australian law for the purpose of enforcement. In this context, the Australian government argued in *Polyukhovich*, that section 9 of the *War Crimes Act* 1945 (Cth) –under which Polyukhovich was prosecuted for acts as a non-Australian, outside of Australia, against non-Australians – was constitutionally valid because it discharged "an obligation incurred by Australia under customary international law." 172 C.L.R. at 504.

can be obtained,[59] just as civil jurisdiction may lie in all states wishing to provide civil remedies for gross human rights violations based on each states' legal interest in the observance of human rights everywhere. International law does not prohibit such a result.

In *Regie National Des Usines Renault SA v. Zhang*, (2002) 210 C.L.R. 491, the High Court held that Australian long arm jurisdiction was properly exercised over two French corporations, not registered in Australia, in an automobile product liability action commenced in Australia. The claim arose as a result of an automobile accident in New Caledonia (the courts of which are part of the French judicial system in which French law applies). The plaintiff, an Australian permanent resident, alleged that the injuries he suffered in the accident were the result of negligent design by the French corporations. Even though the High Court held that French law applied, it ruled that the Australian proceedings should not be stayed and transferred to New Caledonia. In the court's view a stay of proceedings would only be appropriate if the Australian court was a "clearly inappropriate forum," and it was not here.

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[59] *See* Brian Fitzgerald, *Dow Jones & Co Inc v Gutnick: Negotiating 'American Legal Hegemony' in the Transnational World of Cyberspace*, 27 Melb. U.L.R. 590, 591 (2003).

In *Re Maritime Union; Ex parte CSL Pacific*, (2003) 214 C.L.R. 397, a unanimous High Court held that section 5(3) of the *Workplace Relations Act 1996* (Cth) was a valid enactment under s 51(i) of the Constitution (the trade and commerce power) and allowed the Australian Industrial Relations Commission to assume jurisdiction over industrial matters pertaining to the relationship between employers and maritime employees so far as those matters relate to trade or commerce between Australia and a place outside Australia. The High Court ruled that it did not matter that neither the employer nor the employees were residents of Australia, nor that the contracts of employment were made outside Australia (and presumably governed by foreign law).

Several lessons can be gleaned from these cases and others. *See also XYZ*, 227 C.L.R. 532; *Polyukhovich*, 172 C.L.R. 501; *R v. Halton; Ex parte AUS Student Travel Pty. Ltd.*, (1978) 138 C.L.R. 201; *Birmingham University and Epsom College v. Commissioner of Taxation*, (1938) 60 C.L.R 572; *Gagarimabu v. BHP Ok Tedi*, [2001] V.S.C. 304 (27 Aug.); *Gagarimabu v. Broken Hill Proprietary Co. Ltd.*, (2001) V.S. Ct. 517. The most important lesson, though, is that Australian courts exercise jurisdiction over non-nationals in relation to actions and events in the territory of other states and beyond its national jurisdiction. The lesson is important because it allows for an ATS

comparison. When the comparison is made, it seems evident that Australia does what it complains should not be done.

CONCLUSION

This is an easy case. The Court is called upon to confirm the long-standing application of extraterritorial jurisdiction under the ATS. The case provides an opportunity to add lustre to the venerable U.S. judicial tradition in which the courts are seen to serve as a "guard" of "the rights of individuals" and a "bulwark" against powerful interests. *The Federalist* No. 78 (Alexander Hamilton). It provides an opportunity to prove what this Court said in a different context – that "[a] right secured by the law of nations to . . . people, is one that the United States . . . [is] bound to protect." *United States v. Arjona*, 120 U.S. 479, 487-88 (1887).

This case is a vehicle by which to seize these opportunities not as a court for the world but as a leader among courts in all countries with equally legitimate concerns and potential concurrent jurisdiction to see justice done in cases of gross human rights abuses in violation of international law. This Court should reverse the United States Court of Appeals for the Second Circuit in this matter.

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